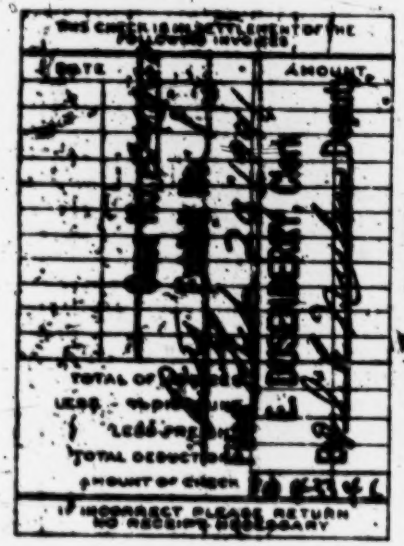

Jerome Distributing Co., Inc.
COMMISSION MERCHANTS
66 HARRISON STREET

No. 7701

NEW YORK Nov. 17 1932

PAY TO THE ORDER OF Pennsylvania Railroad Co $1433 46/100 DOLLARS

Jerome Distributing Co., Inc.

NATIONAL BANK OF YORKVILLE
IN NEW YORK, N.Y.

1-763

J Fishtelley PRES. SEC'Y.

PLAINTIFF'S EXHIBIT 1

PLAINTIFF'S EXHIBIT 2

246

Jerome Distributing Co., Inc.
COMMISSION MERCHANTS
66 HARRISON STREET

No. 7707

NEW YORK Nov. 22 1932

PAY TO THE ORDER OF [illegible] $ 35 11

SEVENTY [illegible] DOLLARS

[illegible] Distributing Co., Inc.

[illegible] BANK
OF [illegible]
IN NEW YORK, N.Y.

1-762

[illegible]

Y

NATIONAL BANK OF YORKVILLE
IN NEW YORK

37

To No. 24

Account Closed	Guarantee of Signature
Attached	Guarantee of Endorsement
Alteration of Date	Guarantee of Amount
Authority for Signing Receipt	Insufficient Funds
Bank Stamp Missing	Irregular
Collateral Endorsement Required	Mutilated
Corporate Title Missing	Missing Endorsement
Customer Signature Missing	No Account
Date	No Instructions to Pay
Do Not Charge Again	Official Signature Missing
Drawn Against Uncollected Funds	Payment Stopped
Endorse as Drawn	Sent us in Error
Endorse in Ink	Signature Incorrect
Endorsement Illegible	Signature Missing
Filing	Signature Unknown
(2)	Signature not Satisfactory

3

THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK

[redacted] BRANCH NEW YORK [redacted]

[redacted]	WHEN DRAWN	REASON FOR RETURNING	[redacted]
[redacted]	[redacted]	[redacted]	[redacted]

WE HAVE CHARGED YOUR ACCOUNT FOR THE ABOVE ENCLOSED RETURN ITEMS.

PLEASE CALL FOR ADVICE

THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK

BY _____

To [redacted]

(2)

PLAINTIFF'S EXHIBIT 3

107

247

NATIONAL BANK OF YORKVILLE
IN NEW YORK

THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK

NEW YORK

[redacted]	[redacted]	[redacted]	[redacted]

WE HAVE CHARGED YOUR ACCOUNT FOR THE ABOVE RETURN ITEMS.

PLEASE CALL FOR SAME

THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK

BY

TO [redacted]

PLAINTIFF'S EXHIBIT 4

PLAINTIFF'S EXHIBIT 5

104

249

Jerome Distributing Co., Inc.
COMMISSION MERCHANTS
66 HARRISON STREET

No. 7696

NEW YORK, Nov 14 1932

PAY TO THE ORDER OF Pennsylvania Railroad Co

NINE HUNDRED SEVENTY-FIVE AND 00/100 DOLLARS

Jerome Distributing Co., Inc.

NATIONAL BANK OF YORKVILLE
1-963
IN NEW YORK, N.Y.

NATIONAL BANK OF [illegible]
IN NEW YORK

To No. 74

37

(5)

(6)

NOTE TELLER
ADVICE OF DEBIT

THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK

RETURNS CASES ITEMS — BRANCH — NEW YORK

YOUR LETTER DATE	ON WHOM DRAWN	REASON FOR RETURNING	AMT.
11/[illegible]/22	Wm. Jarvis Dist. Co., Ltd.,	Short	

WE HAVE CHARGED YOUR ACCOUNT FOR THE ABOVE RETURN ITEMS.

PLEASE GIVE FOR PAID

THE CHASE NATIONAL BANK
OF THE CITY OF NEW YORK

BY _____

To The Pennsylvania Railroad Company
S. S. Hoagland, Agent.
Piers 51-52-53,
New York, N. Y.

(5)

250

PLAINTIFF'S EXHIBIT 6

PLAINTIFF'S EXHIBIT 7

RETURNED ITEMS

Name	Amount	Number	Amount	No.	Bank	Branch	Depositor	Reason Returned		Amount	
CERTIFIED CHECKS PAID		**CASHER'S CHECKS PAID**		8			Victoria Coat Co.	Bank stamp		26 12	
[illegible]	147 15	Bond		74			Gentle Market	Dated Nov 23 (Chicago)	✓	15 25	J Caples
[illegible]	100 00			74			Pk. Rolling	" Nov. 20		18 50	Bank collection
[illegible]	200 00			30			Big G Furniture Co	" Nov. 26		20 00	
[illegible]	167 67			30			[illegible]	Ridgway Trust Co. Tribune Natl. Bk.		24 70	
	1508 67			120			[illegible]			10 00	
				2			Victoria Coat Co.	Bank stamp		45 00	
		Rec. Teller		126			Klein Adv. Agency	" "		3 10	
				23			Hagman & Schmidt	" "		25 28	
End.				33			Harry Simon	Date altered		70 10	
H. Witt	Filling	State	57 25	74			Sarah Weisman	Natl. Brent Bank		11 88	
Sterling Garage		Short	50 00	74			Ida Goldberg	Bank stamp		9 00	
[illegible]	Rec'd	Short	21 39	8			Jas. J. Boyle	Maker deceased		8 00	
Ann Garage	Rec'd	Nov. 26	15 00	120			T. Capes & Co.	Ent. as drawn		29 83	
Mr. [illegible]		Short	69 51							324 78	
Sutton Leaf Co.	Dated	Nov	35 24	12			Jerome Det. Co. Inc.	Short		3165 54	Erie N. B.
John [illegible]	Office	Inc.	25 00	74	Franklin		" " " "	"		9237 11	Penn. N. B.
			1023 37	74			Hastings, Schmidt Inc.	"	Charge	2700 00	Sutton Leaf Co.
				126			" "	"	Charge	55 50	[illegible]
		Ref. Items		65			Gillian & Perkins Inc.	"	Charge	486 72	Comp. Gen. Co.
8 Sol Lubitzer		End.	12 85	30	1513-1 Cent.		Andrew B. Bacon	"	Charge	27 20	Alex Stella
120 Rinell Inc Candy Stores		Ag. stopped	11 00	2			Crisp Realty Corp.	"	Charge	80 00	Billy Inc Litch
33 Refrigerator Corp		"	174 55	45			Frances Feist	"	Charge	12 75	Cashier
45 J. Virginia Radio Corp		Ent. as drawn	Short 400 00	2			Gentle Market	"	Charge	61 52	G. G. Brian Inc.
137 Vaughan Art Service		" in ink	10 00	74	Franklin		" "	"	Charge	100 00	R. C. Williams Co.
45 Home Trucking Corp.		" as drawn	26 00	74			Market Table Co. Inc.	Long	Charge	20 00	Louis Rubens
12 Hardy & Randhall		Filling	25 00	30			Harry J. Mathis	Short	Charge	33 67	Jas. Ellis
45 Jagat Stall Fur Co		Ent.	21 00	2			Redcliff Moving & Storage	Items			Cashier
137 Solaire Prod.		" in ink	24 50	30			David Kotler	"	Charge	16 11	M. Radke
8 Wm. McKinley & Sister		Filling	47	45			" "	"	Charge	3 54	N. Y. Times
[illegible]				120			S. Virginia Radio Co.	Short	Charge	33 00	R. W. Smalley
28 Sip Steam Boys. Candy Sales		Ag. stopped	500	424	84 St.		" " "	"	Charge	42 00	Bertram Hall
9 Alexander Freund		Old Indexing	4111	45	Bway		" " "	"	Charge	20 07	E. L. Mc George
			391 48	45			" " "	"	Charge	155 76	Mary Keats
				45	5th Ave.		" " "	"	Charge	155 57	" "
				45 #			[illegible]	[illegible]	Charge	40 00	Edwin Klein
				45	81 St.		Emanuel Lithgow	Gone	Charge	7 50	Hagman & Algus
				5			" "	"	Charge	5000	R. W. Inc. Manhattan
TIME CERT OF DEP PAID		CERTIF. OF DEPOSIT PAID		30			Adolph Steinberg	Short	Charge	1695 3	Atlantic Express Co.
										1745 67	
								Be forwarded		391 48	
										1804 95	

[fol. 255] IN SUPREME COURT OF CALIFORNIA IN BANK

L. A. Pennsylvania R R Co.
18001 Mid-State Horticultural Co. } By the Court:

ORDER TRANSFERRING CASE—Filed September 3, 1941

This cause being within the appellate jurisdiction of the District Courts of Appeal under Sections 4 and 4-b, Article VI of the Constitution, and having been improperly appealed to the Supreme Court:

It Is Ordered that the same be transferred to the District Court of Appeal of the Fourth Appellate District.

Dated: Sept. 3, 1941.

Gibson, Chief Justice.

[File endorsement omitted.]

[fol. 256] IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT

4 Civil No. 2699

THE PENNSYLVANIA RAILROAD COMPANY (a corporation), Plaintiff and Respondent,

vs.

MIDSTATE HORTICULTURAL CO., INC., Defendant and Appellant

OPINION—Filed April 16, 1942

The facts of this case are fairly and clearly stated in the opinion prepared by Mr. Justice pro tem. Schottky and need not be repeated here. He also cites the leading cases on the question presented though we believe a somewhat closer examination of some of them is advisable.

The sole question involved in this appeal is this: Can the limitation provided in subparagraph "a" of paragraph [fol. 257] 3 of section 16 of the Interstate Commerce Act (vol. 49, § 16, U. S. C. A.) be waived by the shipper by a written agreement executed on sufficient consideration be-

fore the statute has run? This sub-section, in effect at the time here involved, provided as follows:

"Sec. 16, par. (3) *Limitation of actions.* (a) All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

It is too well settled to need citation of supporting authority that, generally, a debtor can waive a statute of limitations either by a sufficient writing or by failure to plead it as a defense to the action against him.

An important exception to this rule is clearly stated in 34 Am. Jur., page 16, as follows:

"A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of [fol. 258] creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. Such a provision will control, no matter in what form the action is brought. The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability. Whether an enactment is of this nature, or whether it is a statute of limitations, should be determined from a proper construction of its terms."

In *Walsh v. Mayer*, 111 U. S. 31 [4 S. Ct. 260, 28 L. Ed. 338], it is held that where a right of action is created by statute and a limitation on the time in which to commence the action is imposed, the limitation is a condition attached to the right itself and is not a part of the law of remedy; that if the remedy "is not asserted within the permitted period, it ceases to exist and cannot be claimed or enforced [fol. 259] in any form." The same conclusions were reached

in *The Harrisburg v. Rickards*, 119 U. S. 199 [7 S. Ct. 140, 30 L. Ed. 358], *Davis v. Mills*, 194 U. S. 451 [24 S. Ct. 692, 49 L. Ed. 1067], and the same rule was announced in *United States Use of Texas Portland Cement Co. v. McCord*, 233 U. S. 157 [34 S. Ct. 550, 58 L. Ed. 893], as follows:

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause of action did not exist before, and is the creature of the statute. The act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute. The right of action given to creditors is specifically conditioned upon the fact that no suit shall be brought by the United States within the six months named, for it is only in that event that the creditors shall have a right of action and may bring a suit in the manner provided. The statute thus creates a new liability and gives a special remedy for it, and upon well-settled principles the limitations upon such liability become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself. *Pollard v. Bailey*, [fol. 260] 20 Wall. (U. S.) 520, 526, 527, 22 L. Ed. 376, 378; *Fourth Nat. Bank v. Francklyn*, 120 U. S. 747, 756, 30 L. Ed. 825, 829, 7 S. Ct. Rep. 757; *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 52 L. Ed. 1096; 28 S. Ct. Rep. 726; *United States Use of Gibson Lumber Co. v. Boomer*, 106 C. C. A. 164, 183 Fed. 726 (Circuit Court of Appeals for the Eighth Circuit.)"

The cited authorities support the foregoing rule stating the exception to the general rule and it should not be necessary to review them in detail here.

It follows that the only question necessary for consideration is whether plaintiff's right of action to recover its bill for freight was created by the Interstate Commerce Act or whether it existed independent of that act.

Counsel for both parties have been diligent in their search of the law and have cited a large number of cases. They agree that the case of *Pennsylvania R. Co. v. Susquehanna Collieries Co.*, 23 Fed. (2d) 499, is the only decided case with facts exactly paralleling those of the instant case. In no other case had the carrier and shipper signed a written contract in which the shipper expressly waived the statute of limitations set forth in the Interstate Commerce Act. While [fol. 261] that case was decided by a United States District

Court, it is entitled to due respect and consideration here as it is the only federal decision on the construction to be given the Interstate Commerce Act where the precise question is presented which confronts us and under exactly similar facts. In that case the court held that the right of action grew out of a contract and was not created by statute. Having reached that conclusion no other result could have been reached than to hold that the bar of the statute had been waived.

While it is true that it is generally held that there is no national common law in the United States in the sense that there is a common law in the various states that have adopted it, this does not mean that the federal Constitution and statutes are to be interpreted without reference to the rules of the common law. Under this theory federal statutory construction has been so closely related to the rules of common law construction that in some cases it has been said that in this respect there is a national common law resting upon national authority.

An instructive case on this question is *Murray v. Chicago & N. W. Ry. Co.*, 62 Fed. 24, written by a United States district judge who courageously refused to follow prior hold-
[fol. 262] ings of other courts on this question. That action was brought by a shipper to recover alleged discriminatory overcharges for freight shipped over a common carrier commencing in 1875 and continuing a number of years thereafter so the shipments were made before and after the adoption of the first Interstate Commerce Act on February 4, 1887. The action was commenced on August 25, 1892, and the court held all claims for discriminatory overcharges paid prior to the statutory limitation period barred by the statute. In the course of the opinion it is said:

"In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action, and therefore, in the present case, all shipments made before the adoption of the interstate commerce act are governed by the common law, and those made since the adoption of that act by the common law as modified by that act."

The opinion in the Murray case was expressly approved by the Supreme Court of the United States in *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92 [21 S. Ct.

561, 45 L. Ed. 765], which was a case brought to recover [fol. 263] discriminatory charges alleged to have been wrongfully collected by the common carrier for telegraphic services rendered. It was there said:

"But this question is not a new one in this court. In *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 275, 36 L. Ed. 699, 704, 4 Inters. Com. Rep. 92, 96, 12 S. Ct. Rep. 844, 847, a case which involved interstate commerce, it was said by Mr. Justice Brown, speaking for the court:

" 'Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act (24 Stat. at L. 379 chap. 104), railway traffic in this country was regulated by the principles of the common law applicable to common carriers.' " (See, also, *Parkersburg & O. R. Transp. Co. v. Parkersburg*, 107 U. S. 691 [2 S. Ct. 732, 27 L. Ed. 584]; *United States v. Wong Kim Ark*, 169 U. S. 649 [18 S. Ct. 456, 42 L. Ed. 890]; *Kansas v. Colorado*, 206 U. S. 46 [27 S. Ct. 655, 51 L. Ed. 956].)

The conclusion follows from these cases that unless the Interstate Commerce Act created a right of action in the carrier to collect transportation charges, independent of the common law right of action to recover those charges on its written contract, if there was a bill of lading, or on an [fol. 264] implied contract to pay for the services rendered, if there was no bill of lading, the limitation on the carrier's cause of action affected the remedy and not the right of action where, as here, the shipper had paid no part of the freight charges.

In considering this question it should not be out of place to consider the causes that led up to the enactment of the Interstate Commerce Act and the abuses it sought to correct before adverting to the provisions of the act itself. These are set forth at some length in the case of *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197 [16 S. Ct. 666, 40 L. Ed. 940]. It is there said:

"While shippers of merchandise are under no legal necessity to use railroads, practically they are. The demand for speedy and prompt movement virtually forbids the employment of slow and old-fashioned methods of transportation, at least in the case of the more valuable articles of traffic. At the same time, the immense outlay of money required to build and maintain railroads, and the necessity

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of resorting, in securing the rights of way, to the power of eminent domain, in effect disable individual merchants and shippers from themselves providing such means of car- [fol. 265] riage. From the very nature of the case, therefore, railroads are monopolies, and the evils that usually accompany monopolies soon began to show themselves, and were the cause of loud complaints. The companies owning the railroads were charged, and sometimes truthfully, with making unjust discriminations between shippers and localities, with making secret agreements with some to the detriment of other patrons, and with making pools of combinations with each other, leading to oppression of entire communities.

"Some of these mischiefs were partially remedied by special provisions inserted in the charters of the companies, and by general enactments by the several states, such as clauses restricting the rates of toll, and forbidding railroad companies from becoming concerned in the sale or production of articles carried, and from making unjust preferences. Relief, to some extent, was likewise found in the action of the courts in enforcing the principles of the common law applicable to common carriers,—particularly that one which requires uniformity of treatment in like conditions of service.

"As, however, the powers of the states were restricted to their own territories, and did not enable them to efficiently control the management of great corporations, whose [fol. 266] roads extend through the entire country, there was a general demand that Congress, in the exercise of its plenary power over the subject of foreign and interstate commerce, should deal with the evils complained of by a general enactment, and the statute in question was the result."

The opinion goes on to consider the act itself and the conclusion is reached that it was intended to limit the power of the common carriers to fix their rates and to put an end to discriminations among and preferences to shippers. Thus the burden was placed on the carrier and the benefit was given to the shipper. This was recognized in *Central R. Co. of New Jersey v. Anchor Line*, 219 Fed. 716 [136 C. C. A. 388], where it was held that the act was not for the benefit of the carrier but for the protection of the shipper.

A study of the act leaves the conclusion that it lacks appropriate language to create in the common carrier a right of action to collect its transportation charges, where no part of them has been paid, separate and distinct from its common law right to bring such an action. Of course, such right of action is recognized, but hardly created, and [fol. 267] recovery is limited to the rates established by the Interstate Commerce Commission.

The conclusion follows that in a case such as we have here where no part of the transportation charges had been paid and the carrier brings its action to recover all of those charges based on rates established by the Interstate Commerce Commission, the cause of action is one in contract given by the common law to the carrier long before any Interstate Commerce Act was adopted and is not a right of action created by that act. Therefore the limitation in that act does not destroy the right of action by reason of lapse of time, but is merely a limitation on the remedy which may be waived by the shipper.

There is nothing in any of the cases cited to us that in any manner conflicts with this conclusion. With one exception all of those cases were either by the carrier to recover the difference between the rate paid by the shipper and the higher rate fixed by the commission or by the shipper to recover the difference between the rate paid by the shipper and the lower rate fixed by the commission. There was no such right of action known to the common law. The cause of action was created by statute.

[fol. 268] A further ground of distinction between all of those cases and this case rests in the fact that there was no contract waiving the statute between the carrier and the shipper. The time fixed by the statute of limitations had run. The limitation was pleaded. The actions were held barred. No other results could have been expected under those circumstances. By what we have just said we do not intend to intimate that where there has been an under or over payment of the freight rates fixed by the Interstate Commerce Commission; a contract waiving the statute would be given effect. That question is not involved here.

It is at once apparent from this statement that none of those actions could have been maintained at common law. Under the common law the parties were bound by their

contracts, the actions were upon those contracts and the amounts of recovery were fixed by those contracts.

The distinction here made is recognized in the case of *Button v. Atchison, T. & S. F. Ry. Co.*, 1 Fed. (2d) 709, which was an action by the carrier to recover the difference between an undercharge paid it by the shipper and rates fixed by the commission. The court said:

[fol. 269] "It is plain upon these facts that at common law the carrier could not have recovered of the shipper any additional sum as freight. Its right to maintain the present suit is created by the Interstate Commerce Law (Comp. St. § 8563, *et seq.*). It arises out of the provision of that act which requires the carrier to collect, and the shipper to pay, the full charge named in the tariffs filed by the carrier with the Interstate Commerce Commission. *Pittsburgh etc. Ry. Co. v. Fink*, 250 U. S. 577, 581, 40 S. Ct. 27, 63 L. Ed. 1151; *New York Central R. R. Co. v. York & Whitney Co.*, 256 U. S. 406, 408, 41 S. Ct. 509, 65 L. Ed. 1016."

The one case cited in which it does not appear that the carrier brought the action to recover the difference between the undercharge paid by the shipper and the rate fixed by the commission is *Galveston H. & S. A. Ry. Co. v. Webster*, 27 Fed. (2d) 765. From the facts set forth in the opinion this question cannot be determined. As the question presented here was not considered there we cannot regard that case as conflicting with the conclusions reached here.

The distinction between the two lines of cases may be briefly summarized. When no part of the freight has been [fol. 270] paid the action is on the contract and is based in the common law and is not created by statute. In those cases the effect of the statute important here is to fix the amount of recovery. When the action is to recover the difference between an undercharge or an overcharge and the legal rates fixed by the Interstate Commerce Commission, the right of action is created by the statute as no such cause of action existed at the common law. In the first case where no part of the freight had been paid the limitation is on the remedy only and does not extinguish the cause of action so it may be waived by the parties to the contract. In the second case where part of or more than the rates established by the Interstate Commerce Commission have been paid, the cause of action is created by

the statute and the limitation is a condition to maintaining the action and lapse of time destroys the right of action.

To advert again to the purposes of the Interstate Commerce Act we quote from *A. J. Phillips Co. v. Grand Trunk Western Railway Company*, 236 U. S. 662 [35 S. Ct. 444, 59 L. Ed. 774], as follows:

"To have one period of limitation where the complaint is filed before the Commission, and the varying periods [fol. 271] of limitations of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discriminations relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier."

If the purpose of the Interstate Commerce Act is to prohibit unjust discrimination by the carrier and to protect the shipper, then certainly the judgment in this case should be affirmed. To do otherwise would be to permit a carrier to give preference to a large shipper by the very procedure here followed. It would not only open the gate but would signpost the way to discriminations and preferences.

Defendant in its brief virtually has conceded that there was no error in sustaining the demurrer to its fourth affirmative defense, so that question need not be considered except to say that under the federal rule governing these [fol. 272] actions it seems to be established that there cannot be an estoppel against the collection of freight charges that will result in discriminations or preferences which will amount to rebates of legal freight charges.

The judgment is affirmed.

Marks, J.

Barnard, P. J., concurred.

DISSENTING OPINION

Appellant shipper appeals from a judgment in favor of respondent railroad company in an action to recover transportation charges for grapes shipped by appellant during

the 1932 season from points in Fresno County, California, to a consignee in the city of New York. There is little dispute as to the facts and I will summarize them briefly.

During October and November, 1932, appellant, as shipper and consignor, shipped from points in Fresno County over the various lines of connecting railroads, including those of respondent, a number of cars of fresh grapes, which were consigned to and delivered to the consignee Jerome Distributing Company (hereinafter called Jerome Company). None of the transportation charges were prepaid. At the time of the delivery of the grapes, the transportation charges were neither demanded by respondent [fol. 273] nor paid by the Jerome Company. On November 19, 21 and 22, 1932, the Jerome Company delivered to respondent three checks covering the transportation charges involved in this action, and other items not involved here, and respondent receipted the freight bills and delivered said receipted bills to Jerome Company which, within a few days thereafter, transmitted them to appellant. These checks were not paid and respondent endeavored unsuccessfully to enforce payment on them from the Jerome Company. Appellant did not learn until the summer of 1933 that the Jerome Company had failed to meet the transportation charges. Shortly before the expiration of three years after delivery to Jerome Company of the various shipments of grapes, demand was made upon appellant for the unpaid transportation charges and litigation threatened unless payment was made. In order to enable appellant to make such investigation as it deemed essential with respect to the basis of respondent's claim, and to avoid the immediate commencement of the threatened action, appellant, on October 25, 1935, signed and delivered to respondent an extension of time for the bringing of such action. This agreement recited that appellant [fol. 274] agreed that respondent was urging against appellant a claim for certain specified transportation charges; that respondent proposed to bring suit against appellant; that appellant desired additional time to investigate and consider the claim, and requested respondent to withhold filing suit until January 1, 1936; that respondent, in the hope that appellant would conclude to pay without litigation, was willing to defer commencement of suit until January 1, 1936; and said agreement then concluded as follows:

"Now, therefore, in consideration of the forebearance of The Pennsylvania Railroad Company to bring such a suit against the Mid State Horticultural Company, Inc., prior to October 28, 1935, the said Mid State Horticultural Company, Inc., hereby agrees that if and when The Pennsylvania Railroad Company may find it necessary to bring such an action, it, the said Mid State Horticultural Company, Inc., will not plead in any such suit the defense of any general or special statute of limitations.

"This agreement is not an admission of the alleged debt by the Mid State Horticultural Company, Inc., and is made without prejudice to any other defenses which the said Mid [fol. 275] State Horticultural Company, Inc., may have to said claim."

Appellant notified respondent prior to January 1, 1936, that it would not pay said transportation charges and the action was filed on December 31, 1935.

Appellant in its amended answer to the amended complaint set up the provisions of section 16(3) (a) of the Interstate Commerce Act, contending that the three-year lapse of time before suit was commenced destroyed the right asserted by respondent to recover the transportation charges, and deprived the court of jurisdiction, notwithstanding the agreement hereinbefore referred to; and appellant further set up in its fourth affirmative defense the facts relied upon by it to establish that respondent, by its silence respecting the Jerome Company's failure to meet the transportation charges, which silence continued during the period in which appellant ignorantly settled its account with the Jerome Company, estopped respondent to look to appellant for payment thereafter. The trial court sustained respondent's demurrer to the fourth affirmative defense and granted respondent's demurrer to strike out said defense.

[fol. 276] Appellant's principal contention is that the trial court erred in giving effect to the extension agreement of October 25, 1935, which, appellant contends, "was void and of no effect and could not and did not serve to avoid the operation of the limitation provision of the Interstate Commerce Act, which upon the expiration of the three-year period, destroyed the liability of appellant and deprived the court of jurisdiction of this action." Appellant contends further that "irrespective of how our primary contention that the action is governed by the limitation of

section 16(3) (a) may be determined upon this appeal, the inconsistency between the trial court's conclusion with respect to that proposition and its exclusion of the defense of estoppel must compel a reversal of the judgment, so that if, as the trial court necessarily held, the action was not barred by limitation, the defendant and appellant may be afforded an opportunity to establish the defense of estoppel."

By the enactment of the Interstate Commerce Act, Congress assumed exclusive jurisdiction over interstate carriers and shipments. As was said by the Supreme Court of the United States in the case of *Adams Express Co. v.* [fol. 277] *Croninger*, 226 U. S. 491 [33 S. Ct. 148, 57 L. Ed. 314]:

"That the legislation supersedes all the regulations and policies of a particular state upon the same subject results from its general character. It embraces the subject of the liability of a carrier under a bill of lading which he must issue, and limits his power to exempt himself by rule, regulation, or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it. Only the silence of Congress authorized the exercise of the police power of the state upon the subject of such contracts. But when Congress acted in such a way as to manifest a purpose to exercise its conceded authority, the regulating power of the state ceased to exist."

And as stated by our own Supreme Court in *New York Central R. R. Co. v. Frank H. Buck Co.*, 2 Cal. (2d) 384 [41 P. (2d) 547]:

"'The shipments being interstate, the rights and liabilities of the parties are governed by the acts of Congress as interpreted by the federal tribunals. (*Cincinnati N. O. & T. P. R. Co. v. Rankin*, 241 U. S. 319 [36 S. Ct. 555, 60 L. [fol. 278] Ed. 1022, L. R. A. 1917A, 265].)'"

It is apparent from the act itself and from the decisions rendered since its enactment, that the principal purposes sought to be achieved by the enactment of the Interstate Commerce Act were to secure just and reasonable charges for transportation, to prohibit unjust discrimination in the rendition of like services under similar circumstances and

conditions, and to prevent preferences to and discriminations among persons, firms, corporations and localities.

As was well said in the case of *L. M. Kirkpatrick Co. v. I. C. R. Co.*, 190 Miss. 157 [195 So. 692]:

"The outstanding purpose of the Commerce Act was to absolutely uproot and destroy all discriminations in interstate commerce, regardless of how conceived or by what plan, scheme or device they may be sought to be accomplished. To that end the carrier is without power to waive any valid provision of the contract constituting a defense."

Appellant's position is as follows: First, respondent's cause of action is one created by the Interstate Commerce Act, and as such is destroyed by the lapse of time provided [fol. 279] in section 16, paragraph (3) (a). Therefore, it is beyond the power of the parties to waive those provisions, and the court lacked jurisdiction to enforce payment of the freight charges. Respondent's answer to this argument is that the cause of action is not one created by the Interstate Commerce Act, but is a common law action based upon a contract of shipment between the parties; that as to such a cause of action, section 16, paragraph (3)(a), is a mere statute of limitations and may be waived.

Appellant's second position is that to permit a waiver of section 16, paragraph (3)(a), invites discriminations and preferences, and therefore any such attempted waiver is illegal and void. Respondent's answer to this argument is that the agreement resulted in no discrimination; that if any preference could be said to have resulted from such waiver, it was not an undue or unreasonable preference forbidden by the act; and that to permit appellant thus to entirely avoid payment of the freight charges would result in the most exaggerated and reprehensible type of discrimination which the act seeks to prevent.

We believe it may fairly be stated that the right of a transportation company engaged in interstate commerce to col- [fol. 280] lect its transportation charges existed prior to the Interstate Commerce Act, and that in that sense it was not created by the act, but it must also be stated that a transportation company engaged in interstate commerce cannot enter into a contract for transportation except upon the rates, terms and conditions set forth in the act, and that the act, and every part thereof, must be consi-ered a part of the contract.

In the case of *Chicago & N. W. Ry. Co. v. J. I. Case Plow Works;* 173 Wis. 237 [180 N. W. 846], the court said:

"The right to private contract between shipper and carrier is wholly abrogated by the Interstate Commerce Act, and the rates fixed by law are enforceable by the carrier by force of law."

And in *Chicago I. & L. Co. v. Peterson,* 168 Wis. 193 [169 N. W. 558], the court said:

"The relations between common carriers and shippers are no longer mere matters of contract, but are fixed by the laws and rules regulating such interstate commerce and partake of the nature of statutory obligation." (Citing cases.)

We are, therefore, unable to agree with the respondent's contention that respondent's cause of action is not one created by the Interstate Commerce Act but is a common-[fol. 281] law action of shipment between the parties, because it is clear to us that under the authorities the cause of action as it existed and as it must necessarily be enforced, was one created by said act. But whether it is considered that the cause of action is one at common law, or is one created by the Interstate Commerce Act, we think it must be conceded that section 16(3) (a) of the act applies to this action, because it is certainly an action at law by a carrier, subject to the act, for the recovery of its charges.

One of the things that we must decide is the proper interpretation of section 16(3)(a) which reads as follows:

"All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after."

If said provision is a mere statute of limitations, then, in accordance with the general rule that such a statute may be waived, it must be held in this case that appellant by said written waiver extended the time for filing the action. If, on the other hand, the section must be construed to mean that upon the expiration of three years from the delivery of the shipments involved, the right to collect [fol. 282] charges thereon was utterly destroyed by operation of the section, and thereafter the court lacked jurisdiction to enforce the payment of such charges, then such

written waiver could not confer jurisdiction upon the court, and appellant would not be estopped from relying upon such defense by reason of such waiver.

In construing and interpreting the statute, the purpose sought to be accomplished must always be kept in mind, and the various provisions of the statute should be construed and interpreted with due regard to the manifest purpose of the entire statute. In the construction of an act of Congress we must, of course, look to and be guided by the decisions of our federal courts, and we will therefore refer to a number of such decisions.

Before doing so we think it proper to state that while subdivision (a) of paragraph (3) of section 16 is the only part of said paragraph applicable to this case, it is to be noted that with respect to each type of action referred to in said paragraph (3), the same language as to limitation, namely, "within three years * * * and not after," is used except as to time, because some of the decisions that will be referred to deal with other subdivisions of the paragraph.

[fol. 283] In the case of *A. J. Phillips Co. v. Grand Trunk W. R. Co.*, 236 U. S. 662 [35 S. Ct. 444, 59 L. Ed. 774], the Supreme Court of the United States said:

"It is argued, however, that under the conformity act (Rev. Stat. §914, Comp. Stat. 1913, §1537), the case is to be governed by the Michigan practice, which does not permit a defendant to take advantage of the statute of limitations by a general demurrer to the declaration. But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should be filed within two years, *and not after*. Under such a statute the lapse of time not only bars the remedy, but destroys the liability. (*Finn v. United States*, 123 U. S. 227, 31 L. Ed. 128, 130, 8 S. Ct. Rep. 82), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. This will more distinctly appear by considering the requirements of uniformity which, in this, as in so many other instances, must be borne in mind in construing the commerce act. The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would [fol. 284] have made it illegal for the carriers, either by

silence or by express waiver, to preserve to the Phillips Company a right of action which the statute required should be asserted within a fixed period."

In the case of *Kansas City Southern Ry. Co. v. Wolf*, 261 U. S. 133 [43 S. Ct. 259, 67 L. Ed. 571], the Supreme Court, referring to the Phillips case, *supra*, said:

"True it is that the claim of Phillips & Co. was based upon schedule tariff charges theretofore declared to be unreasonable by the Interstate Commerce Commission, while here the payments demanded are said to exceed the published rates when properly applied. But the doctrine of the Phillips case and reasoning advanced to support it, we think, are applicable to the circumstances of the instant cause. The lapse of time had destroyed any liability by the carrier to the shipper or his assignee for the alleged overcharges, and the demurrer should have been sustained."

In the case of *William Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U. S. 633 [45 S. Ct. 612, 69 L. Ed. 1126], it was said:

"It is settled by the decisions of this court that the lapse of time not only barred the remedy, but also destroyed the [fol. 285] liability of defendant to plaintiff. (*Phillips v. Grand Trunk Ry.*, 236 U. S. 662, 666, 35 S. Ct. 444, 59 L. Ed. 774; *Louisville Cement Co. v. Interstate Commerce Commission*, 246 U. S. 638, 642, 38 S. Ct. 408, 62 L. Ed. 914; *Kansas City Southern Ry. v. Wolf*, 261 U. S. 133, 139, 43 S. Ct. 259, 67 L. Ed. 571.) On the expiration of the two-year period, it was as if liability had never existed."

The case of *Galveston, H. & S. A. Ry. Co. v. Webster Co.*, 27 Fed. (2d) 765, was an action by a carrier to recover charges from a shipper and his surety, and the defendants relied upon the provisions of section 16(3) (a). The court said, at page 766:

"The single subject-matter of the suit is the recovery by the carrier of its charges for freight in interstate transport. Its right to sue is given by the Interstate Commerce Acts. The federal law governs. That statute provides something more than a limitation of the time within which suit is to be brought. By its terms, failure to sue within the time fixed absolutely destroys further right of action. There can be no saving exception accorded the surety by

the local law. Principal and surety stand on the same footing in this case. The action is destroyed by the supreme [fol. 286] law. The cause of action no longer exists against either principal or surety."

In the case of *Button v. Atchison, T. & S. F. Ry. Co.*, 1 Fed. (2d) 709, likewise an action by a carrier to recover charges from a shipper, the Circuit Court of Appeals, Eighth Circuit, said at pages 711-712:

"There is another ground upon which the case may be rested. Plaintiff's right of action is given by statute. It was not created for its enrichment but to protect the public against secret rebates and discriminations. It is not a right of contract or of property. The right, therefore, is at all times under the full control of the legislature. It may limit it in any way without impairing any constitutional right of the plaintiff. (Citing cases.) * * *

"As to such a right the time limited for its enforcement is a constituent part of the right itself. The lapse of time not only bars the remedy, but destroys the liability. (*Theroux v. N. P. R. R. Co.*, 64 Fed. 84, 12 C. C. A. 52; *Phillips Co. v. Grand Trunk Ry. Co.*, 236 U. S. 662, 667, 35 S. Ct. 444, 59 L. Ed. 774; *Kansas City S. Ry. Co. v. Wolf*, 261 U. S. 133, 43 S. Ct. 259, 67 L. Ed. 571.)"

[fol. 287] In the most recent case upon this subject, *Wisconsin Bridge & Iron Co. v. Illinois Terminal Co.*, 88 Fed. (2d) 459, the court said:

"As to the third count, which was in the form of the consolidated common counts, the court overruled the demurrer, and the case went to trial on this count before a different judge. The facts were stipulated. Appellant again pleaded the statute of limitations, and the court held that it was estopped from setting up this defense inasmuch as it was at its own request that the question was submitted to the Commission, thereby causing the period to run while it was there pending. Judgment was thereupon rendered in favor of the carrier, and from that judgment this appeal is prosecuted by the shipper.

"Section 16(3) of the Interstate Commerce Act, 49 U. S. C. A. § 16(3), lays down certain rules as to limitations of actions, providing, *inter alia*, that 'All actions at law by

carriers subject to this chapter for recovery of their charges or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after.' 49 U. S. C. A. § 16(3)(a). The Supreme Court has in numerous cases construed these limitations as jurisdictional, and held that the lapse of time not only bars the remedy but also [fol. 288] destroys the liability. (See *A. J. Phillips Co. v. Grand Trunk Western Ry Co.*, 236 U. S. 662, 35 S. Ct. 444, 59 L. Ed. 774; *Kansas City Southern Ry. Co. v. Wolf*, 261 U. S. 133, 43 S. Ct. 259, 67 L. Ed. 571; *William Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126; *United States ex rel. Louisville Cement Co. v. I. C. C.*, 246 U. S. 638, 38 S. Ct. 408, 409, 62 L. Ed. 914.) In the last named case, the Court said '* * * the two-year provision of the act is not a mere statute of limitation, but is jurisdictional—is a limit set to the power of the commission as distinguished from a rule of law for the guidance of it in reaching its conclusion.' This being true, we think that the defense of limitations was not subject to estoppel, and that it could properly be raised by demurrer or plea, and even if appellant had failed to plead it, it would not thereby have conferred jurisdiction upon the court over the claim which had already been barred at the time the action was brought. (Cf. *Pennsylvania R. Co. v. Carolina Portland Cement Co.* (C. C. A.), 16 F. (2d) 760, *Arkansas Fertilizer Co. v. United States* (Com. Ct.), 193 Fed. 667.)" (See, also, *Pennsylvania R. Co. v. Carolina-Portland Cement Co.*, 16 Fed. (2d) 760; *Louisville & Nashville R. Co. v. Cory*, 54 Fed. (2d) 8; *Zang* [fol. 289] *v. Railway Express Co.*, 130 Ohio St. 17 (196 N. E. 901).)

Respondent, in reply to the foregoing authorities cited by appellant, asserts correctly that not one of such cases involves an action by a carrier to recover freight or demurrage charges in which the shipper has waived or extended the provisions of section 16, paragraph (3) (a), and respondent cites the case of *Pennsylvania R. Co. v. Susquehanna Collieries Co.*, 23 Fed. (2d) 499, as being the only decision on the precise facts, and contends that that decision should amount to binding authority upon this court. In view of the fact that practically the entire argument of respondent is based upon this case, we will quote the brief opinion in full:

"WESTENHAVER, District Judge. This cause is before me on defendant's demurrer to plaintiff's petition. Plaintiff's action is to recover demurrage charges. The point urged in support of the demurrer is that paragraph (3), section 16, of the Interstate Commerce Act, as amended by Transportation Act 1920, section 424 (Comp. St. § 8584), requires that all actions at law by carriers subject to that act for the recovery of their charges or any part thereof shall be begun within three years from the time the cause of action accrues [fol. 290] and not after. Plaintiff's action was not commenced within three years. In excuse, it is pleaded that within three years, and before the cause of action was barred, plaintiff and defendant entered into an agreement to waive the defense of the statute of limitations on condition that suit should not be brought within the statutory period, and that this agreement is still open and subsisting. Plaintiff admits that under the Ohio practice the defense of the statute of limitations may be made by demurrer, if, on the allegations of the petition, the statute is applicable.

"Defendant urges that the right to recover demurrage charges is a right conferred by statute, to which is annexed as a condition that suit to recover must be brought within the statutory period, and hence that the right of action is barred, and cannot be prolonged or kept alive by an agreement such as would apply to an ordinary action.

"Upon due consideration, I am of opinion that plaintiff's action to recover demurrage charges is not a right conferred by the Interstate Commerce Act, and is not within the authorities relied on by defendant. On the contrary, I am of opinion that plaintiff's right of action grows out of contract. This is none the less true, even though demurrage charges, [fol. 291] like tariff rates, must be prescribed in a tariff filed with the Interstate Commerce Commission, and cannot be departed from or varied by the parties, either before or after the service is performed. The cases cited, arising under other provisions of the same section, have no application. In those cases the right of action did not grow out of contract, but out of the statute. No right of action existed except until and as the Interstate Commerce Commission made a finding of certain facts.

"In view of this conclusion, it is unnecessary to consider whether a right created by statute, with a condition annexed that it shall be enforced within a limited period, as suits for

wrongful death, or actions on a reparation award of the Interstate Commerce Commission, may be kept alive by a voluntary agreement of the parties. It is difficult, however, to perceive any sound reason why it may not. Certainly none of the cases cited so hold.

"The demurrer will be overruled, and an exception may be noted."

The decision just quoted was rendered by the District Court, Northern District of Ohio. No authority is cited in the opinion and there is no reference to any of the decisions of the United States Supreme Court hereinbefore cited. [fol. 292] The author of the opinion held that the right to sue for demurrage charges was not a right conferred by the Interstate Commerce Act but was a right which accrued out of contract, and that the statute of limitations could be waived. The opinion does not discuss the object intended to be achieved by the statute and emphasized in other decisions. It is worthy of note that this case has not been cited in any subsequent case.

We are convinced from the authorities that the conclusion reached by the court in the Susquehanna case is opposed to the great weight of authority. We believe that it was the intention of Congress in fixing the limitation of "within three years and not after" to guard against the circumvention of one of the chief purposes sought to be achieved by the enactment of the Interstate Commerce Act, namely, the prevention of preferences and discriminations among persons, firms, corporations and localities. We believe further that under the decisions of the United States Supreme Court and various United States circuit courts and district courts, we are compelled to hold that when Congress provided in the Interstate Commerce Act that "all actions at law by carriers subject to this chapter for recovery of their charges, * * * shall be begun within [fol. 293] three years from the time the cause of action accrues and not after," it meant that carriers should not grant preferences for delaying for a long period of time the enforcement of the payment of charges, and therefore intended to provide, and did provide, that unless the action was commenced within the three-year period, the carrier would lose the right to collect them by action. In construing this section we must have in mind the paramount purpose of the Interstate Commerce Act, and when we have

that purpose in mind, that it was an act to protect the public against rebates and discriminations, it is not difficult to understand why the federal courts have, with the single exception of the Susquehanna case, held that the period provided for the commencement of actions thereunder was different from the ordinary statute of limitations created for the benefit of the debtor, who could waive it, because it was simply a matter which concerned the parties to the action.

It may be that in some cases the waiver of the statute will not result in undue or unreasonable preference or discrimination. However, that is a question that goes to the wisdom or policy of the act, and, as was said by Mr. Justice Field, later a justice of the Supreme Court of the United States, [fol. 294] in *Ex parte Newman*, 9 Cal. 502, 520, "It is not for the judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power never conferred by the Constitution."

We conclude, therefore, that under the provisions of section 16(3)(a), upon the expiration of the period therein prescribed within which action must be taken by the carrier, the cause of action is destroyed and the court's jurisdiction over the matter is terminated; and that neither the carrier nor the shipper can legally waive the provisions of said section, nor extend the period within which an action must be instituted, and that any such waiver or agreement to forebear is contrary to the plain policy of the act and is therefore against public policy and void.

It follows that the trial court erred in giving effect to the extension agreement of October 25, 1935, and in holding that plaintiff was entitled to judgment.

In view of the fact that appellant concedes that under the authorities the trial court was correct in its view that a shipper cannot assert an estoppel against a claim for transportation charges, it is unnecessary to discuss the question [fol. 295] as to whether or not the court erred in sustaining respondent's demurrer to appellant's fourth affirmative defense and in striking out said defense.

In view of the foregoing the judgment should be reversed.

Schottky, J. pro tem., dissenting.

[fol. 296] IN SUPREME COURT OF CALIFORNIA

4 Civil No. 2699

THE PENNSYLVANIA RAILROAD COMPANY (a Corporation), Plaintiff and Respondent,

vs.

MIDSTATE HORTICULTURAL CO., INC., Defendant and Appellant

APPELLANT'S PETITION FOR A HEARING BY THE SUPREME COURT—Filed May 25, 1942

After Decision by the District Court of Appeal, State of California, Fourth Appellate District, and Numbered Therein 4 Civil No. 2699

To the Honorable Phil S. Gibson, Chief Justice, and to the Associate Justices of the Supreme Court of the State of California:

The appellant herein respectfully petitions for a hearing by this court of this controversy after decision by the Dis-[fol. 297] trict Court of Appeal, Fourth Appellate District. Questions of law alone are involved. The decision was by a divided court, two opinions having been filed. The facts, which are without dispute, are substantially narrated in the dissenting opinion which apparently was the first opinion written, for the majority opinion refers to it in the following language:

"The facts of this case are *fairly and clearly* stated in the opinion prepared by Mr. Justice Pro Tem Schottky and need not be repeated here."

The majority opinion further states with reference to the opinion of the dissenting justice that

"He also cites the *leading cases* on the question presented, though we believe a somewhat closer examination of some of them is advisable."

This action was instituted to recover from the defendant, consignor, certain transportation charges arising out of shipments in interstate commerce. Respondent carrier was obligated to collect the transportation charges from the

ultimate consignee (Jerome Distributing Company) located in New York, upon delivery of the shipments, but instead of doing so and in violation of the Interstate Commerce Act, as well as an order promulgated by the Interstate Com- [fol. 298] merce Commission, and without the knowledge of appellant, it delivered the shipments to the consignee, taking from it checks for the charges due. At the time these checks were taken respondent *receipted the freight bills*, delivering them to the consignee who in turn sent them to the consignor. Later, by litigation which resulted in a judgment in favor of respondent, it attempted to enforce payment of the above mentioned checks against consignee but, because of the latter's insolvency, without avail.

Upon the settlement of its accounts with consignee, in the belief that the transportation charges had been paid, appellant allowed it credit therefor. Shortly before the expiration of the period within which an action could be brought to recover such transportation charges, respondent demanded payment thereof from appellant which, to permit it to investigate the basis of the demand, signed a waiver of the statute of limitations, respondent agreeing to defer instituting its threatened action until a date shortly after such period had expired. As a result of its investigation, appellant refused to pay such charges and this action was instituted.

In its defense appellant contended that the waiver of the statute violated the purposes intended to be accomplished [fol. 299] by Congress in enacting the Interstate Commerce Act and was therefore void and, as a special defense, pleaded that because of its conduct and silence respondent was estopped from enforcing payment of such transportation charges against appellant.

Respondent, however, contended that when considering the applicability of the statute of limitations, the right of action should be considered a creature of the common law rather than of the Interstate Commerce Act, but that in passing upon the question of estoppel resort to the Act alone should be had.

The trial court adopted respondent's inconsistent theories and held that the right of action was at common law, and that section 16 of the Act should be construed as a mere statute of limitations and, therefore, could be waived, and that appellant's defense of estoppel was not available to it because of the provisions of the Act.

Preliminarily, we believe it proper to state that this petition could safely be based upon the dissenting opinion alone, for the reason that its reading, including the decisions to which reference is therein made (which are but a few of the [fol. 300] many extant), must convince this court that it should have controlled the determination of the appellate court.

The grounds upon which appellant requests a hearing by this court of this cause, briefly stated, are as follows:

1. That the action is governed by the provisions of the Interstate Commerce Act, and particularly section 16 thereof, as construed and interpreted by the United States Supreme Court, the appellate courts of appeal, and the highest courts of the various states.

2. That upon the expiration of three years from the delivery of the shipments involved, the right to collect the transportation charges was destroyed by the operation of section 16(3)(a) of the Act, which expressly provides that it shall apply to "*all carriers subject to this chapter,*" and therefore the court lacked jurisdiction to enforce payment thereof.

3. That the intent and purpose sought to be accomplished by Congress in passing the Act (implicit in the Act itself), prohibits the waiver of the limitation period prescribed by section 16 of the Act.

4. Whether the pending action is one to enforce a right based upon the Interstate Commerce Act or rising out of [fol. 301] contract is immaterial: Defendant being a carrier subject to the Act in either case upon the expiration of the limitation period, the right of action ceases and jurisdiction is lost.

5. That regardless of all other considerations, it must be held that the Act created a right of action theretofore nonexistent in federal jurisdiction, which Act prescribed the period within which such action had to be commenced, thereby bringing the existing controversy within the exception to the limitation rule recognized by the appellate court in its majority opinion.

6. That if the appellate court correctly held that the right of action was not based upon the Act, but was at common

law, its further holding that under the Act the defense of estoppel was not legally permissible, was unwarranted and constituted a miscarriage of justice by subjecting appellant to double liability.

7. That a rehearing is essential to the end that uniformity of decision upon the important questions involved may be maintained (*W. R. Phillips Co. v. Grand Trunk R. Co.*, 236 U. S. 662, 59 L. Ed. 774), and that appellant may not be subject to double liability by failure of the trial court to follow well-established legal principles.

[fol. 302] In support of the legal propositions stated, appellant relies not only upon the decisions hereinafter cited, but, likewise, upon the clear and explicit dissenting opinion which, in the judgment of its counsel, contains an exposition of the legal principles involved harmonious with existing controlling authority.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 303] IN SUPREME COURT OF CALIFORNIA, IN BANK

[Title omitted.]

ORDER GRANTING HEARING, AFTER JUDGMENT BY DISTRICT COURT OF APPEAL—Filed June 12, 1942

Appellant's petition for hearing Granted and cause transferred to this Court.

Dated June 11, 1942.

Gibson, Chief Justice; Shenk, Justice; Edmonds, Justice; Traynor, Justice.

[File endorsement omitted.]

[File endorsement omitted.]

[fol. 304] IN SUPREME COURT OF CALIFORNIA

The PENN R. R. Co. *v.* MIDSTATE ETC. Co. -LA. 18001

OPINION—Filed November 27, 1942

"SHENK, J.

This is an appeal from a judgment in favor of the plaintiff for the sum of $13,678.86, representing unpaid freight charges. The defendant was the consignor of interstate shipments of grapes over the plaintiff's and its connecting lines. The complaint was filed more than three years after the cause of action accrued. The plaintiff pleaded a written agreement of waiver of the statute of limitations executed by the defendant. The defendant interposed a demurrer on the ground that the action was barred by the provisions of section 16, paragraph (3)(a) of the Interstate Commerce Act. The demurrer was overruled. In its answer the defendant admitted the execution of the alleged agreement, but denied its validity as an effective waiver of the statute. The action was tried on the issues raised by the complaint and answer. On the findings of fact and conclusions of law judgment was entered in favor of the plaintiff for the amount of the unpaid freight charges and interest. If the court was correct in its ruling on the demurrer, the judgment is supported by the record.

The facts are undisputed. In October and November, 1932, the defendant consigned twenty-one car loads of fresh grapes from points in Fresno County, California, which ultimately were delivered to Jerome Distributing Company as consignee in the State of New York. The latter company on November 19, 21 and 22, 1932, issued to the plaintiff three checks which covered all of the freight items involved in this controversy and for which the consignee, referred to as the Jerome Company, received freight bills receipted by [fol. 305] the plaintiff. The receipted bills were transmitted to the defendant who in turn credited the Jerome Company's account.

In the meantime the checks of the Jerome Company were refused payment by the drawee bank because of insufficient funds. The plaintiff filed an action against the Jerome Company which proceeded to judgment, but nothing was

collected thereon. Toward the close of 1935 the plaintiff made demand on the defendant for payment of the freight charges and threatened action in the event of nonpayment prior to the imminent expiration of the three-year statutory period of limitations. The defendant required time for investigation of the claim. In order to avoid immediate commencement of the action the defendant, on October 25, 1935, executed and delivered to the plaintiff the writing alleged in the complaint by which it assumed to extend for a period of about three months the time within which the railroad company could commence an action for the recovery of the freight charges. The express consideration for the promise on the part of the shipper was the forebearance by the railroad company to bring suit prior to the expiration of the statutory period as extended by the waiver or such earlier time as the shipper should definitely refuse to pay the claim. On December 26, 1935, the defendant shipper definitely refused to pay the freight charges. The present action was commenced on December 31, 1935, which was three years and forty days after the last shipment was delivered.

The question is whether the written agreement of waiver of the statute of limitations is binding on the defendant. The sufficiency of the consideration for the agreement is not questioned.

The answer to the question is controlled by the federal statutes and the federal courts' construction thereof as applied to similar facts. (See New York Central R. R. Co. v. Frank H. Buck Co., 2 Cal. 384; Adams Express Co. v. Croninger, 226 U. S. 491

Section 16(3)(a) of the Interstate Commerce Act [49 U. S. C. A. sec. 16, par. (3)] reads: "All actions at law by carriers subject to this chapter for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues, and not after." In the same paragraph of that section are similar provisions limiting the time within which shippers may file complaints with the commission for recovery of damages not based on overcharges ('within two years from the time the cause of action accrues, and not after'), and for recovery of overcharges ('within three years from the time the cause of action accrues, and not after').

[fol. 306] The only reported decision involving the validity of a written agreement by a shipper to waive such a statute

of limitations is by a federal court and it supports the plaintiff's position. (Pennsylvania R. Co. v. Susquehanna Collieries Co., 23 F. 2d 499.) In that case, decided in 1927 the same plaintiff, Pennsylvania R. Co., brought an action in the United States District Court against Susquehanna Collieries Co. to recover demurrage charges. The action was not begun within the three years limited by section 16, paragraph 3 of the Interstate Commerce Act. In excuse the plaintiff pleaded that within the three-year period the defendant had entered into a written agreement to waive the statute of limitations on condition that suit be not brought within the statutory period, and that the agreement was still in effect. The defendant there interposed a demurrer and argued the same contention which is made by the defendant in this case, namely: that the right to recover charges was a 'right conferred by statute, to which is annexed as a condition that suit to recover must be brought within the statutory period, and hence that the right of action is barred, and cannot be prolonged or kept alive by an agreement such as would apply to an ordinary action.' The district court in overruling the demurrer expressed the opinion that the right of action to recover such charges, as distinguished from a right of action created by the Interstate Commerce Act, grew out of contract, was not necessarily extinguished by the expiration of the statutory period, and could be kept alive by the written agreement of the parties. The court considered that this was so even though the charges must be prescribed in a tariff filed with the Interstate Commerce Commission, and could not be departed from or varied by the parties. The Court said: 'The cases cited, arising under other provisions of the same section, have no application. In those cases the right of action did not grow out of contract, but out of the statute.' It was also pointed out that in none of the cited cases was it held that such a contractural right may not be kept alive by a voluntary agreement of the parties. Apparently no reported case since that time has involved such a written waiver of the statute of limitations. As a consequence the decision of the district court in the Susquehanna case has been neither disapproved nor criticized in the fourteen-year period since its rendition. It is not contended by the defendant that shippers in the meantime have not signed time limitation extension agreements. If they have done so, it may be assumed that they considered them binding pursuant

to the decision in the Susquehanna case, at least until the present litigation.

The defendant nevertheless contends that the decision in the Susquehanna case may not be considered as authoritative in view of language employed in decisions by appellate [fol. 307] courts in the federal jurisdiction. The defendant relies especially on A. J. Phillips Co. v. Grand Trunk Western Railway Co., 236 U. S. 662; Louisville & N. R. Co. v. Cory, 54 F. 2d 8; Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. 2d 459; and Zang v. Railway Express Co., 130 Ohio St. 17 [196 N. E. 901], as contrary to the decision in the Susquehanna case.

Generally, a statute of limitations may be extended or waived. (Wells Fargo & Co. v. Enright, 127 Cal. 669; Tebbets v. Fidelity & Casualty Co. of New York, 155 Cal. 137; 37 C. J. 723, Sec. 41. This general rule governs unless the action is created by statute and the language of definition requires a construction that the cause of action is destroyed by the lapse of the period of limitations provided by the statute. Under that exception to the rule the expiration of the time within which suit must be brought operates to terminate the obligation as well as to bar the remedy. (17 R.C.L. 952.)

In the cases relied on by the defendant the courts were applying the exception to the general rule. In the Phillips Co. case the shipper sought to recover an alleged overcharge —an amount paid pursuant to the contract, but which was in excess of an alleged reasonable rate. Other shippers had commenced a proceeding before the Interstate Commerce Commission to determine the reasonableness of the rate, and the commission had determined that the rate was unreasonable to a certain extent. The shipper, Phillips Co., which had not joined in the proceedings before the commission, brought an action to recover the excess four years after the cause of action accrued. The plaintiff contended that the state statute of limitations applied. It was held that the action should have been brought within the two-year period provided by the Interstate Commerce Act. In connection with the contention that under the conformity act and the Michigan practice the question could not be raised by demurrer the court said 'But that rule does not apply to a cause of action arising under a statute which indicates its purpose to prevent suits on delayed claims, by the provision that all complaints for damages should

be filed within two years *and not after*. Under such a statute the lapse of time not only bars the remedy but destroys the liability * * * To permit a railroad company to plead the statute of limitations as against some and to waive it as against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discriminations relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defense open to the carrier. The Railroad Company therefore was bound to claim the benefit of the statute here * * * For when it appeared that the [fol. 308] complaint had not been filed within the time required by the statute it was evident, as a matter of law, that the plaintiff had no cause of action.'

In the case of Louisville & N. R. Co. v. Cory, the plaintiff recovered judgment against the railroad company for breach of the common law duty to furnish cars for interstate transportation of coal. Suit had been brought more than two years after the cause of action accrued. It was urged by the plaintiff that the limitation of the Commerce Act had no application, but that the state enactment applied where the declaration alleged a right of recovery at common law. The court held that the two-year period of the Commerce Act applied 'to all actions involving subject-matter directly covered by the act and as to which the shipper is given the right to file a petition for reparation order with the Commission. * * * The enactment of the statute of limitations prescribing the time beyond which claims may not be asserted against interstate carriers is essentially a matter of regulation of interstate commerce, and the requirement of uniformity of treatment would be defeated by permitting one period of limitation where the complaint is filed before the commission, and the varying periods of limitations of the different states, where a suit is brought in a court of competent jurisdiction,' citing the Phillips Co. case.

In Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., the carrier sought recovery of freight undercharges, that is, the amount over the contract rate which it was required to collect in compliance with the act. The action was brought more than three years after the cause of action accrued.

The defendant pleaded the limitation. It was held that even if the shipper 'had failed to plead it, it would not thereby have conferred jurisdiction upon the court over the claim which had already been barred at the time the action was brought.'

None of the foregoing cases involved an express agreement by the shipper to waive the statute of limitations. The first two were actions by the shipper. The Wisconsin Bridge Co. case, in which the carrier sued for undercharges, involved a statutory cause of action, as distinguished from a contract right. The quoted language of the court was confined to a consideration of an assumed failure to plead the statutory limitation in such a case.

The case of Zang v. Railway Express Co. is of no material assistance to the defendant. There, as in the Phillips Co. and Louisville & N. R. Co. cases, the shipper sued for damages, and the court held that the three-year limitation of the Commerce Act in force at the time the cause of action accrued barred the right of recovery, even though in a later amendment the limitation was omitted. It was said: 'There is a marked distinction between our statute of limitation affecting the remedy only which must be specially pleaded as a defense, and special statutory limitations taking away the right itself. In the latter class, time is [fol. 309] of the essence of the right, and the lapse of the prescribed period in which an action may be commenced wholly extinguishes the right.' It was concluded that the alleged cause of action was of the nature of a right extinguished by the expiration of the statutory limitation.

Language in other cases following those cited is also relied on by the defendant, but none of them involved a written or any waiver of the applicable statute of limitations. Consequently, in no case, except the case of Pennsylvania R. Co. v. Susquehanna Collieries, did it become necessary to distinguish between a contract or common law right and a statutory right, for the purpose of considering the application of the general rule that a statute of limitation may be expressly waived.

The defendant contends that there can be no distinction between common law and statutory liability under the limitation clause of the Interstate Commerce Act. However, the Supreme Court of the United States has had occasion to note the distinction between causes whose existence are controlled by time limiting provisions and causes as to

which the statute is remedial only. It distinguished the two classes in William Danzer & Co. v. Gulf & Ship Island Railroad Co., 268 U. S. 633, wherein it followed the Phillips Co. and other cases in holding that a cause of action for damages against the carrier belongs to the class whose existence is limited by the two-year period provided in the Commerce Act.

In considering the remedies preserved by section 22 of the Interstate Commerce Act the Supreme Court in Pennsylvania Railroad Company v. Puritan Coal Mining Co., 237 U. S. 121, said that the act was both declaratory of existing common law and creative of new causes of action. It made the distinction between a common law right, such as a cause of action for damages for breach of duty to furnish cars of which state courts had concurrent jurisdiction, and created rights such as those which depended on administrative procedure and a preliminary finding by the commission. That case was followed in Pennsylvania Railroad Co. v. Sonman Shaft Coal Co., 242 U. S. 120, 124, where the court reiterated the statement that existing rights and remedies not inconsistent with the act were preserved.

A similar distinction was noted by the Circuit Court of Appeals, Eighth Circuit, in Button v. Atchison, T. & S. F. Ry. Co., 1 F. 2d 709, which was an action by the carrier for undercharges. The action was filed more than three years after the cause of action accrued and the statute of limitations was relied upon by the defendant. The state statute provided for a three-year period of limitation. More than two years after the cause of action accrued the federal three-year statute was enacted. The plaintiff contended that the federal statute enlarged the right. The court stated [fol. 310] that at common law the carrier could not have recovered from the shipper any additional sum as freight; that the carrier's right to maintain the action was created by the Commerce Act; and that the right 'was not created for its enrichment, but to protect the public against secret rebates and discriminations. It is not a right of contract or of property * * * As to such a right the time limited for its enforcement is a constituent part of the right itself. The lapse of time not only bars the remedy, but destroys the liability,' citing the Phillips Co. and other cases. (See, also, Pennsylvania R. Co. v. Miller, 124 F. 2d 169).

The defendant urges that judicial recognition of the waiver agreement would invite discriminatory preference

by carriers, an evel which it was the purpose of the Commerce Act to avoid. Sections 2 and 6 of the act prohibit special rates, rebates, refunds and remissions. Section 3 (1) provides that it shall be unlawful for any common carrier to make, give, or cause any undue or unreasonable preference or advantage in any respect whatsoever. However, the present problem cannot be resolved by a consideration of the question of unreasonable preference granted by the carrier to the shipper.

If we assume that the forebearance by the carrier under the written waiver of the shipper was a preference, and that the question is pertinent in this case, it does not follow that the forebearance under the circumstances was either forbidden or unreasonable. The main purpose of the agreement was not to extend credit to the defendant, but was to preserve the rights of the carrier. There is no justification for a conclusion that under the facts in this case the purpose was abused as a cover for extending an unreasonable preference. Moreover, the remedy for the giving of an unreasonable preference is the recovery of damages by the person discriminated against and who has been injured thereby. (Sec. 8, Interstate Commerce Act, 49 U. S. C. A.). An example is Gamble-Robinson Commission Co. v. Chicago, N. W. Ry. Co., 168 F. 161, where an action was brought by a shipper who had not received the same credit terms accorded other shippers. The court said in that case that the Commerce Act left the carrier free to exercise all the rights and privileges under the common law insofar as they were not rendered unlawful by the act; that the act did not make all preferences or advantages unlawful, and that there was nothing unreasonable in requiring prepayment of freight in the case of one shipper and in extending credit to another. If in the present case the defendant's contention in this respect were to prevail, the result would be that the shipper who has been the recipient of the preference would be deemed injured thereby. Certainly he should not be heard to contend that injury to him has resulted because he is compelled to discharge his liability to pay lawful freight charges—a liability which was created when the shipments were deliv- [fol. 311] ered and has never been discharged. The purpose of the act is to secure equal treatment to all shippers.

It is founded on a sound public policy. But that policy should not permit the favored shipper to urge discrimina-

tion against others for the purpose of enabling it to escape a liability which it was otherwise bound to discharge.

The defendant finally contends that if its waiver of the statute be held sufficient and binding, its defense of estoppel against the carrier should not have been stricken by the court. The alleged estoppel was based on the act of the carrier in receipting the bills for freight when the Jerome Company's checks were delivered to it, and the subsequent crediting of the Jerome Company's account by the defendant on the faith of the receipts sent to it by the Jerome Company. It is the carrier's duty to collect all lawful freight charges. Under the contract here it was the consignor's obligation to pay them. It has been decided that the carrier cannot waive defenses and cannot be estopped (except by the running of the statute of limitations) from performing its duty to collect the charges. (See New York Central R. R. Co. v. Frank H. Buck Co., 2 Cal. 2d 384; Texas & Pacific Railway Co. v. Leatherwood, 250 U. S. 478, 481; Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co., 241 U. S. 190, 197; Chesapeake & Ohio Ry. Co. v. Martin, 283 U. S. 209; Chicago & N. W. Ry. Co. v. J. I. Case Plow Works, 173 Wis. 237 (180 N. W. 846); Chicago, I. & L. Ry. Co. v. Peterson, 168 Wis. 193 (169 N. W. 558); New York, N. H. & H. R. Co. v. California Fruit Growers Exchange, 125 Conn. 241 (5 A. 2d 353), citing Louisville & N. R. Co. v. Central Iron & Coal Co., 265 U. S. 59, and other cases; Spartan Mills v. Davis, 126 S. C. 312 (119 S. E. 905); L. M. Kirkpatrick Co. v. I. C. R. Co., 196 Miss. 157 (195 So. 692).)

However, as we have noted, a contract to preserve the carrier's right and duty to collect lawful freight charges as against the running of the statute of limitations, when reasonably exercised, serves to prevent rather than create discrimination among shippers, and in our opinion, should not be deemed violative of the language or purpose of the Interstate Commerce Act.

The judgment is affirmed.

Gibson, C. J., Curtis, J., Edmonds, J., Carter, J., Traynor, J., and Spence, J., pro tem., concurred.

[fol. 312] IN SUPREME COURT OF CALIFORNIA, IN BANK

[Title omitted]

ORDER DENYING REHEARING—Filed December 24, 1942

Appellant's petition for rehearing Denied.

Dated: December 22, 1942.

Gibson, Chief Justice.

[File endorsement omitted.]

[fol. 313] IN SUPREME COURT OF CALIFORNIA

Los Angeles.

No. 18001

THE PENNSYLVANIA RAILROAD COMPANY, a Corporation, Plaintiff, Respondent,

vs.

MIDSTATE HORTICULTURAL COMPANY, INC., a Corporation, Defendant, Appellant

On appeal from the Superior Court in and for the County of Fresno

JUDGMENT

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

It Is Ordered, Adjudged, and Decreed by the Court that the Judgment of the Superior Court in and for the County of Fresno in the above entitled cause, be and the same is hereby affirmed.

Respondent to recover costs on appeal.

I, B. Grant Taylor, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing

is a true copy of an original judgment entered in the above entitled cause on the 27th day of November, 1942, and now remaining of record in my office.

Witness my hand and the seal of the Court, affixed at my office, this 28th day of December, A. D. 1942.

B. Grant Taylor, Clerk, By L. F. White, Deputy
(Seal.)

[fol. 314] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 207] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. —

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner.

It Is Ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 22, 1943.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 16th day of March, 1943.

[fol. 208] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 24, 1943

The petition herein for a writ of certiorari to the Supreme Court of the State of California is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.